

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

IN RE PHARMACEUTICAL INDUSTRY	)	
AVERAGE WHOLESALE PRICE	)	MDL No. 1456
LITIGATION	)	
	)	
	)	CIVIL ACTION: 01-CV-12257 PBS
THIS DOCUMENT RELATES TO:	)	
	)	
<i>State of Iowa v. Abbott Laboratories, et al.</i>	)	Judge Patti B. Saris
	)	
	)	

**SEPARATE MEMORANDUM OF DEFENDANT BOEHRINGER INGELHEIM  
CORPORATION IN SUPPORT OF ITS MOTION TO DISMISS**

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***Attorneys for Defendant:***  
***BOEHRINGER INGELHEIM***  
***CORPORATION***

Defendant Boehringer Ingelheim Corporation (“BIC”) submits this separate memorandum in support of its Motion to Dismiss the State of Iowa’s (“Plaintiff’s”) Complaint as to the specific allegations against BIC. BIC also joins in Defendants’ Joint Motion to Dismiss Plaintiff’s Complaint and Memorandum of Law in support thereof (“Defendants’ Joint Motion”), which explains why the claims asserted in the Complaint should be dismissed as to all defendants as a matter of law. BIC submits this separate memorandum to highlight specifically Plaintiff’s failure to allege wrongdoing by BIC in the Complaint.

### **ARGUMENT**

Plaintiff’s Complaint fails as a matter of law against BIC because Plaintiff has failed to identify *any* drugs manufactured by BIC or *any* BIC drugs purchased by the Plaintiff, as required by the pleading requirements of Rule 9(b).

This Court has previously ruled in the MDL litigation that plaintiffs must “clearly and concisely allege with respect to each defendant: (1) the specific drug or drugs that were purchased from defendant; (2) the allegedly fraudulent AWP for each drug; and (3) the name of the specific plaintiff(s) that purchased the drug.” *In re Pharm. Indus. Average Wholesale Price Litig.*, 263 F. Supp. 2d 172, 194 (D. Mass. 2003).

Despite this directive, the Complaints fail to allege that *any* drugs were manufactured by Boehringer Ingelheim Corporation, let alone that plaintiff purchased *any* drugs from BIC at an allegedly fraudulent AWP. Indeed, none of the exhibits to the Complaints lists any drug manufactured by BIC. The failure to identify any BIC drugs is not surprising, since BIC does not manufacture or sell pharmaceutical products. Because the Complaint fails to allege any drugs manufactured by BIC or any BIC drugs purchased by the Plaintiff, Plaintiff has no standing to bring claims against BIC, and BIC should be dismissed from this case pursuant to

Rule 12(b)(6). *See In re Pharm. Indus. AWP Litig.*, 263 F. Supp. 2d at 193 (to satisfy constitutional requirements for Article III standing, plaintiff must allege “personal injury fairly traceable to the defendant's allegedly unlawful conduct...”) (*quoting Allen v. Wright*, 468 U.S. 737, 751 (1984); *Id.* at 177 (“The Court also dismisses. .. all claims regarding drugs that are not identified by name with a specified fraudulent AWP[.]”); *see also In re: Pharmaceutical Industry Average Wholesale Price Litigation*, 2004 WL 2387125 (D. Mass., Oct. 26, 2004) (*Suffolk II*) at \*3. (“The claims against Aventis Pharmaceuticals Inc. are dismissed for failure to plead a drug sold by Aventis Pharmaceuticals Inc[.]”).

### **CONCLUSION**

For these reasons and those articulated in Defendants’ Joint Motion, Plaintiff’s Complaint should be dismissed as to defendant Boehringer Ingelheim Corporation.

Respectfully submitted,

***Defendant***  
***BOEHRINGER INGELHEIM***  
***CORPORATION***

Dated: February 20, 2008

/s/ Eric Gortner \_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I, Eric Gortner, hereby certify that on February 20, 2008, I caused a true and correct copy of the foregoing, **SEPARATE MEMORANDUM OF DEFENDANT BOEHRINGER INGELHEIM CORPORATION IN SUPPORT OF ITS MOTION TO DISMISS**, to be served on all counsel of record in accordance with the Court's Case Management Order No. 2.

Dated: February 20, 2008

/s/ Eric Gortner